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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. [redacted] 70

ALGONQUIN GAS TRANSMISSION COMPANY and TEXAS EASTERN TRANSMISSION CORPORATION,

Petitioners,

v.

NORTHEASTERN GAS TRANSMISSION COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, FEDERAL POWER COMMISSION, BLACKSTONE VALLEY GAS AND ELECTRIC COMPANY and FALL RIVER GAS WORKS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	4
Statement	5
Specification of Errors	12
Reasons for Granting the Writ	15
Conclusion	29
Appendix	31
Map Exhibit No. 1	35
Map Exhibit No. 2	36

TABLE OF CASES.

	PAGE
American Power & Light Co. v. *Securities and Exchange Commission*, 329 U. S. 90 (1946)	21
Ashbacker Radio Corporation v. *Federal Communications Commission*, 326 U. S. 327 (1945)	3, 11, 12, 15, 18, 19, 20, 21, 23
Chicago, St. P., M. & O. Ry. v. *United States*, 322 U. S. 1 (1943)	26
Civil Aeronautics Board v. *State Airlines, Inc.*, 338 U. S. 572 (1950)	4, 13, 15, 22, 23, 24, 25, 26, 28
Federal Communications Commission v. *WJR, The Goodwill Station, Inc.*, 337 U. S. 265 (1949)	28
Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575 (1942)	27
In re *Big Sioux Broadcasting Co.*, 12 F. C. C. 146 (1947)	21
Kentucky Broadcasting Corp. v. *Federal Communications Commission*, 174 F. 2d 38 (D. C. Cir. 1949)	21
Kuhn v. *Civil Aeronautics Board*, 183 F. 2d 839 (D. C. Cir. 1950)	28
National Labor Relations Board v. *Air Associates, Inc.*, 121 F. 2d 586 (2d Cir. 1941)	28
New England Divisions Case, 261 U. S. 184 (1923)	27
People Ex. Rel. *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345 (1917)	26
Southwest-West Coast Merger Application, 3A Pike & Fischer Ad. Law 48g. 14-1 (CAB 1950)	21
Southwest Renewal-United Suspension Case, 2 Pike & Fischer Ad. Law (2d) 98 (CAB 1952)	21
United Fuel Gas Co. v. *Railroad Commission of Kentucky*, 278 U. S. 300 (1929)	25
United States v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515 (1946)	28
West Coast Case, 8 C. A. B. 636 (1947)	21

STATUTES.

PAGE

Natural Gas Act, 52 Stat. 821 (1938), 15 U. S. C. 717-717w, as amended, 56 Stat. 83 (1942), 15 U. S. C. 717f (1946).

Section 7(c) (15 U. S. C. 717f (c)) 3, 4, 5, 12, 15, 16, 18, 19, 22

Section 7(e) (15 U. S. C. 717f (e)) 15

Section 15(b) (15 U. S. C. 717n (b)) 20

Section 16 (15 U. S. C. 717o) 20

Section 19(b) (15 U. S. C. 717r (b)) 2, 19, 20

Section 19(c) (15 U. S. C. 717r (c)) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 781.

ALGONQUIN GAS TRANSMISSION COMPANY and TEXAS EASTERN TRANSMISSION CORPORATION,

Petitioners,

v.

NORTHEASTERN GAS TRANSMISSION COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, FEDERAL POWER COMMISSION, BLACKSTONE VALLEY GAS AND ELECTRIC COMPANY AND FALL RIVER GAS WORKS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Algonquin Gas Transmission Company (Algonquin) and Texas Eastern Transmission Corporation (Texas Eastern), parties by intervention in the proceedings below, pray that a writ of certiorari be issued to review the four judgments of the Court of Appeals for the Third Circuit, which were entered on April 4, 1952, with respect to certain orders of the Federal Power Commission (Commission) and remanding the proceedings to the Commission for further hearings.

Opinions Below.

The opinions of the Commission are as follows: Opinion No. 201, dated October 3, 1950 (R., Vol. I, pp. 84-93); Opinion No. 202, dated November 4, 1950 (R., Vol. I, pp. 94-133); Opinion No. 206, dated February 26, 1951 (R., Vol. I, pp. 134-184); and Opinion No. 208, dated March 1, 1951 (R., Vol. I, pp. 185-210).

The opinion of the United States Court of Appeals for the Third Circuit (R., Vol. VII, p. 1571) is not yet officially reported.

Jurisdiction.

Each of the judgments of the United States Court of Appeals for the Third Circuit was entered on April 4, 1952 (R., Vol. VII, pp. 1587-93). The jurisdiction of the Supreme Court is invoked under Sec. 19(b) of the Natural Gas Act (15 U. S. C. 717r(b)) and under 28 U. S. C. 1254(1).

Questions Presented.

Northeastern Gas Transmission Company (Northeastern) and Algonquin filed with the Federal Power Commission competitive applications to transport and sell natural gas in New England (R., Vol. II, pp. 442a, 471a). After a consolidated hearing of these applications, the Commission granted Northeastern's application in part and denied the remainder, and then determined that Algonquin should serve certain gas distributing companies in New England upon establishing its gas supply (R., Vol. I, p. 94). Thereafter, when only one day remained for the conclusion of the hearing on Algonquin's application, Northeastern filed a second application to serve the same areas which the Commission had determined should be served by Algon-

quin (R., Vol. III, p. 673a). The Commission found that this second application was untimely filed and also that Northeastern had previously had a full opportunity to be heard on the issues involved in its second application, and accordingly dismissed it without a hearing (R., Vol. I, pp. 207-208). The Court of Appeals held that this was error and that a certificate could not be granted Algonquin without first hearing Northeastern's second application (R., Vol. VII, pp. 1578-9, 1584-6). The questions presented are:

(1) Whether the rule announced by the Supreme Court of the United States in *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327 (1945), requires that the decision on an application for a certificate of public convenience and necessity be held up until a hearing is held on a competitive application which is filed near the conclusion of the hearing on the earlier application, or whether a Federal administrative agency has the right to determine that there has been an untimely filing of the later competitive application and that it is not in the public interest to defer decision on the earlier one.

(2) Whether Sec. 7(c) of the Natural Gas Act, as amended, which provides that upon the filing of an application for a certificate of public convenience and necessity the matter shall be set for hearing, requires that a hearing be held on an application which the Commission finds is untimely filed near the conclusion of the hearing on a competitive application.

(3) Whether the rule announced by the Supreme Court of the United States in *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327 (1945), requires that the decision of a Federal administrative

agency on an application for a certificate of public convenience and necessity be held up until there has been a hearing on a second competitive application filed by an applicant when the administrative agency finds that such applicant, in a consolidated hearing previously held on its first application and the application of its competitor, has already had a full opportunity to be heard on the issue of service to the markets involved in its second application.

(4) Whether Sec. 7(c) of the Natural Gas Act, as amended, requires the Commission to grant an applicant a hearing on a second application to serve certain markets when the Commission finds that such applicant has previously had a full opportunity to be heard on the issue of service to such markets in the consolidated hearing held on its first application and on the application of its competitor.

(5) Whether the decision of the Supreme Court of the United States in *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572 (1950), which upheld the action of the Board in the assignment to an applicant of markets that were not within the purview of the specific authorization sought in its application, is applicable to a case, such as the present one, in which applicants seek the assignment of specific distributors in the same general area and to serve such other communities as constitute a potential market for their pipe line systems.

Statute Involved.

The pertinent provisions of the Natural Gas Act of 1938 (52 Stat. 821, as amended by 56 Stat. 83 (1942), 15 U. S. C. 717 *et seq.*) are set forth in the Appendix, *infra*, pp. 31-34.

Statement.

On August 24, 1949, Northeastern, a wholly owned subsidiary of Tennessee Gas Transmission Company (Tennessee), filed with the Commission in Docket No. G-1267 an application under Sec. 7(c) of the Natural Gas Act, as amended, for a certificate of public convenience and necessity for authority to construct and operate a new pipe line system in New England (R., Vol. II, p. 327a). Northeastern requested authority in such application, as amended on March 2, 1950, to serve certain specific gas distributing companies in Massachusetts, Connecticut, Rhode Island, and New Hampshire, and also to serve such communities "as logically should be served by the pipe line system, and which are thus part of the potential market for that system" (R., Vol. II, p. 443a). Northeastern proposed to obtain its supply of gas from Tennessee at the New York-Massachusetts State line and from Transcontinental Gas Pipe Line Corporation (Transcontinental) at the New York-Connecticut state line.[1]

On January 24, 1950, Algonquin, organized by the owners of various New England gas companies, filed an application also under Sec. 7(c) of the Natural Gas Act, as amended, in Docket No. G-1319 for a certificate to authorize the construction and operation of a natural gas pipe line system to serve gas distributing companies in three New England States, Massachusetts, Connecticut and Rhode Island. Algonquin proposed to obtain its supply of natural gas from Texas Eastern near Lambertville, New Jersey (R., Vol. II, p. 471a). An application filed by Texas

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[1] Subsequent to the Commission's decision on Northeastern's application, Transcontinental's contract to supply Northeastern with natural gas was cancelled.

Eastern in Docket No. G-1012 sought authority to construct and operate certain facilities and to sell gas to Algonquin. In the proceeding on Northeastern's first application, Northeastern specifically sought to serve all of the gas distributing companies covered by Algonquin's application, except ten companies. In addition Northeastern offered evidence as to how it would serve all companies covered by Algonquin's application (R., Vol. V, pp. 1265a-1266a).

Tennessee and Transcontinental, which were to be Northeastern's suppliers, and Algonquin's supplier, Texas Eastern, are natural gas companies subject to the jurisdiction of the Commission under the Natural Gas Act, and they presently operate natural gas pipe lines extending from Texas to New York.

The Commission commenced holding hearings March 7, 1950 on the Northeastern application and on the applications of Tennessee and Transcontinental, which sought authority to construct facilities to supply Northeastern; and thereafter the Commission commenced the hearings on the applications of Algonquin and Texas Eastern which were subsequently consolidated for hearing with that of Northeastern, and the consolidated hearing proceeded until August 5, 1950 (R., Vol. II, p. 550a). Northeastern was an intervenor and participated fully in the hearing on the applications of Algonquin and Texas Eastern, and Algonquin was an intervenor in the hearing on Northeastern's application (R., Vol. II, pp. 456a, 394a).

By October 4, 1950, the evidence in the consolidated proceedings was concluded except as to Algonquin's gas supply which was to be incorporated by reference from the record in Texas Eastern's case, and the entire record was before the Commission for its consideration (R., Vol. I, p. 85). It is admitted by Northeastern that by then both applicants

had had complete hearings on all competitive aspects of their respective applications (R., Vol. II, pp. 594a, 596a). On October 4, 1950 the Commission issued its Opinion No. 201, in which it found that the record conclusively demonstrated the need for natural gas in New England, but that neither Northeastern nor Algonquin had proposed projects which would meet the public demand for natural gas in New England in the early future, and the Commission invited the two applicants to present "without delay a proposal based upon evidence now of record which will meet the public demand" (R., Vol. I, p. 90). The Commission stated that it was prepared to reopen the record for supplementary evidence if necessary (R., Vol. I, p. 90).

Pursuant to Opinion No. 201, Northeastern submitted its proposal in which it requested that all of New England be established as its service area and that the application of Algonquin be denied (R., Vol. III, p. 629a). Algonquin submitted its proposal in the form of a supplement to its amended application, in which it set out as alternatives: first, that the New England market be divided between Northeastern and Algonquin in accordance with evidence that had been offered by the Staff of the Commission during the course of the hearing,[2] or second, that Algonquin be authorized to serve the entire New England area (R., Vol. III, p. 632a).

On November 8, 1950, the Commission made its decision on this controversy in Opinion No. 202, in which it determined the issue between the two rival applicants with respect to service of natural gas in the New England area (R., Vol.

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[2] See evidence offered by the Staff of the Commission as a suggested basis for dividing the markets between Northeastern and Algonquin. (Witnesses: Sullivan, Kallina, and O'Connor. R., Vol. V, pp. 1282(2)a-1282(74)a; Exhibits 397-413, R., Vol. IV, pp. 1036a-1062a).

I, p. 94).[3] The Commission rejected the two proposals and found that the issuance of a certificate to either applicant as applied for would render the other applicant's project infeasible. The Commission concluded that it would better serve the public interest to have two wholesale natural gas systems in New England which would be feasible and that there would be a fair and equitable division of the markets with a minimum of duplication of facilities (R., Vol. I, p. 107). Northeastern was authorized to serve thirty-seven distributing systems, including certain companies which Algonquin had sought authority to serve, and the remainder of Northeastern's application was denied. Northeastern, complying with a condition of the Order, advised the Commission in writing that it accepted the certificate (R., Vol. III, p. 645a).

In denying the remainder of Northeastern's application in Opinion No. 202, the Commission denied Northeastern's request for authority to serve seventeen distributing companies which Northeastern had specifically sought authority to serve, and then the Commission found that these seventeen companies, together with nine other distributing companies, would afford a market for Algonquin which would support an economically feasible project that would be in the public interest (R., Vol. I, pp. 107-109). The Commission did not at that time grant a certificate to Algonquin as it was necessary for Algonquin to conclude its case by completing its gas supply evidence (R., Vol. I, p. 109).

In the meantime, Texas Eastern had proceeded with the hearing on its application in Docket No. G-1012. On Decem-

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[3] The competitive aspects of the applications of Algonquin and Northeastern as presented to the Commission prior to Opinion No. 202 are shown in the map, Exhibit No. 1 to this petition. The results of the Commission's action in Opinion No. 202 in dividing the markets between the applicants are shown in the map, Exhibit No. 2 to this petition.

ber 21, 1950, only one day remained for the conclusion of the hearings on the Algonquin and Texas Eastern applications, which were set for January 15, 1951; and on this day December 21, 1950, Northeastern filed its application in Docket No. G-1568, in which it sought authority to serve the twenty-six distributing companies, which the Commission had determined in Opinion No. 202 should be served by Algonquin, and certain other communities not involved here (R., Vol. III, p. 673a). On December 29, 1950, Northeastern filed a supplement to its petition of intervention in the proceeding involving Texas Eastern's application in Docket No. G-1012 and requested the Commission to require Texas Eastern to sell it 60,000 MCF of natural gas per day in the event its application was granted in Docket No. G-1568 (R., Vol. III, p. 687a). On January 8, 1951, Northeastern filed a motion with the Commission requesting that its new application be consolidated with the application of Algonquin (R., Vol. III, p. 727a).

On January 10, 1951 the Commission dismissed Northeastern's second application in so far as it sought authority to serve communities covered by Algonquin's application and also dismissed the supplement to Northeastern's petition of intervention in Texas Eastern's case (R. Vol. I, pp. 61, 79). The dismissal of such supplement, however, did not affect Northeastern's continued participation as an intervenor in the Texas Eastern proceeding in which the matter of gas supply was to be determined. The Commission found that Northeastern's second application and its supplement to the petition of intervention were untimely filed, that Northeastern had previously had a hearing on the issue of service to such communities and that a consolidation of Northeastern's second application with that of Algonquin "would have unduly delayed the service of natural gas to many New England communities and would

have been contrary to the public interest'' (R., Vol. I, pp. 207-208). On January 10, 1951 the Commission also dismissed the Northeastern and Tennessee petitions of intervention in Algonquin's case since the competitive issue between these companies had been decided by Opinion No. 202 (R., Vol. I, pp. 76-77).

The hearing on the Algonquin and Texas Eastern applications was concluded on January 15, 1951, and on February 27, 1951, the Commission issued its Opinion No. 206 granting a certificate of public convenience and necessity to Algonquin to serve the twenty-six gas distributing companies which had been found in the Commission's Opinion No. 202 to be a feasible system for Algonquin, and authorizing Texas Eastern to sell and deliver natural gas to Algonquin (R., Vol. I, p. 134).

Northeastern and Tennessee filed a joint petition for review in the Court of Appeals for the Third Circuit with respect to the Commission's dismissal orders of January 10, 1951, and later, Northeastern and Tennessee filed another joint petition for review with such Court complaining of the order entered by the Commission granting Algonquin a certificate and authorizing Texas Eastern to sell natural gas to Algonquin (R., Vol. I, pp. 1, 211).

In the order accompanying Opinion No. 206, the Commission authorized Algonquin to supply natural gas to Blackstone Valley Gas and Electric Company (Blackstone) and Fall River Gas Works Company (Fall River) (R., Vol. I, pp. 174-175). In Opinion and Order No. 202, the Commission had denied to Northeastern authority to serve these two gas distributing companies and no appeal was taken by Northeastern or these two companies from that order (R., Vol. I, pp. 111, 129). Blackstone and Fall River filed separate petitions for review in the Court of Appeals for the Third Circuit with respect to the order authorizing

Algonquin to supply them with natural gas (R., Vol. I, pp. 283a, 293a).

All four of these petitions for review were consolidated for briefing and oral argument in the Court of Appeals, and Algonquin and Texas Eastern were permitted to intervene in those proceedings. That Court rendered its decision on April 4, 1952, in each of those four cases, and held, as stated in its opinion, that it was error for the Commission to dismiss without a hearing Northeastern's second application to serve the New England area, and also that under the rule of the *Ashbacker* case it was error for the Commission to grant Algonquin's application before hearing Northeastern's second application (R., Vol. VII, pp. 1571-87). The Court held that the three dismissal orders of January 10, 1951, and that portion of the Commission's Opinion and Order No. 206 granting a certificate to Algonquin and authorizing Texas Eastern to sell and deliver natural gas to Algonquin, should be set aside (R., Vol. VII, pp. 1586-7).

Northeastern did not at any time seek a stay of Algonquin's certificate as provided for in Section 19(c) of the Natural Gas Act, and pursuant to such certificate Algonquin commenced the construction of its pipe line system promptly after February 27, 1951 (R., Vol. VII, pp. 1621-2). At the time of the decision of the Court of Appeals on April 4, 1952, Algonquin had expended approximately $23,000,000 on such construction. During this period it had issued and sold Bonds in the principal amount of $27,600,000 and Common Stock in the amount of $9,200,000 (R., Vol. VII, p. 1622). The issuance of the mandate of the Court of Appeals has been stayed pending the filing of this petition for writ of certiorari.

Specification of Errors.

The Court of Appeals for the Third Circuit erred:

1. In holding that the Commission could not grant a certificate of public convenience and necessity to Algonquin without first hearing Northeastern's second application, which was filed in Docket No. G-1568.

2. In holding that Northeastern was entitled to a hearing under Section 7(c) of the Natural Gas Act on its second application.

3. In extending the principle announced by the Supreme Court of the United States in *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U. S. 327 (1945), and thereby holding that the Commission was required to give Northeastern a full new hearing on its second application, and was required to hold up its decision on Algonquin's application until such new hearing had been held.

4. In disregarding the finding of fact of the Commission in Opinion No. 208, which was supported by substantial evidence, that the second application of Northeastern was untimely filed.

5. In disregarding the finding of fact of the Commission in Opinion No. 208, which was supported by substantial evidence, that Northeastern previously had a full opportunity to be heard on the issues raised in its second application.

6. In disregarding the finding of fact of the Commission, which was supported by substantial evidence, that a consolidation of Northeastern's second application in

Docket No. G-1568 and the application of Tennessee in Docket No. G-1582 with Algonquin's application in Docket No. G-1319, as proposed by Tennessee and Northeastern, would have unduly delayed the service of natural gas to many New England communities and would have been contrary to the public interest.

7. In holding that the petitions of intervention of Northeastern and Tennessee in the proceeding on Algonquin's application in Docket No. G-1319 should not have been terminated.

8. In holding that the decision of the Supreme Court in *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572 (1950) was not applicable to the action taken by the Commission in Opinion No. 202 in dividing the markets in New England between Northeastern and Algonquin.

9. In failing to hold that Northeastern in its first application, which was filed in Docket No. G-1267, sought authority to serve all of the communities which were covered by Algonquin's application in Docket No. G-1319.

10. In holding that the Commission should not have dismissed Northeastern's supplement to its petition of intervention in the Texas Eastern proceeding in Docket No. G-1012.

11. In disregarding the finding of fact of the Commission, which was supported by substantial evidence, that Northeastern's second application was a collateral attack on the Commission's Opinion and Order No. 202.

12. In failing to hold that it was without authority to review or construe the findings and determinations con-

tained in the Commission's Opinion No. 202 and accompanying order, of which no review had been sought by Northeastern and which had been permitted to become final and non-reviewable.

13. In failing to hold that Northeastern and Tennessee were estopped to attack the assignment of certain gas distributing companies to Algonquin in the Commission's Opinion No. 202.

14. In holding that Northeastern and Tennessee were not bound by the Commission's Opinion and Order No. 202 with respect to the assignment of certain gas distributing companies to Algonquin.

15. In denying the motions of the Commission to dismiss the petitions for review filed in the Court of Appeals by Blackstone and Fall River.

16. In holding that the following orders of the Commission should be set aside:

(1) The order entered in the Commission's Docket G-1568 on January 10, 1951;

(2) The order entered in the Commission's Docket G-1319 on January 10, 1951;

(3) The order entered in the Commission's Docket G-1012 on January 10, 1951;

(4) Paragraph C of the Commission's Opinion and Order No. 206 issued February 27, 1951;

and in holding that Paragraph B of the Commission's Opinion and Order No. 206 issued February 27, 1951, should be modified so as to eliminate therefrom the authorization to Texas Eastern to sell and deliver natural gas to Algonquin.

Reasons for Granting the Writ.

This case involves questions of manifest importance to the Federal administrative agencies, to the parties participating in hearings before such agencies, and to the general public which is interested in obtaining the service to be authorized by such agencies. These are questions of Federal law involving the interpretation of Secs. 7(c) and 7(e) of the Natural Gas Act and the meaning and application of two decisions of the Supreme Court, *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327 (1945) and *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572 (1950).

I.

The Commission made a finding that the second application filed by Northeastern near the conclusion of the hearing on Algonquin's application was untimely filed (R., Vol. I, p. 208). It also found that Northeastern had had a full hearing on all matters covered by the portion of the second application which was dismissed (R., Vol. I, p. 207). This second application was filed when only one day of hearing remained to conclude the proceeding on Algonquin's application. Despite these facts, the Court of Appeals held that Sec. 7(c) of the Natural Gas Act, as amended, required the Commission to grant Northeastern a hearing on this second application. The Court of Appeals further held that under the decision of the Supreme Court in the *Ashbacker* case, the Commission could not grant the application of Algonquin without hearing the second application of Northeastern. Accordingly, the Court of Appeals concluded that the direct effect of the provision of the Opinion and Order No. 206, which granted a certificate to Algonquin, was "to deny Northeastern its statutory hearing under

Sec. 7(c) of its own competitive and mutually exclusive application." (R., Vol. VII, p. 1586).

If the decision of the Court of Appeals is allowed to stand, it follows that applicants can file applications for certificates of public convenience and necessity near the conclusion of extended hearings on competitive applications and that the administrative agency is required to hold up the decision of such applications until the later applications are heard. This will effectively defeat the administrative process by making final decisions impossible.

It requires months of preparation in these cases in order to establish the economic feasibility of the proposed project, the financial ability of the applicant, the adequacy of the markets, and the sufficiency of the gas reserves to support the operation of the proposed gas pipe line system over a number of years. The hearings before the Commission usually require weeks and months in order to take the testimony offered by the applicant, the numerous intervenors, and the Staff of the Commission.

If an applicant can have a hearing on a second application filed near the conclusion of a hearing on a competitive application, then further applications can be filed at the conclusion of the hearing on the second application, and the hearings can be continued indefinitely and *ad infinitum*. The work of administrative agencies will become so burdensome that they will be unable to handle and conclude these hearings, with resulting irreparable injury to the applicants and intervenors in the proceedings. The general public will be injured as a result of the delay in obtaining natural gas service or other service which must be authorized by a Federal administrative agency.

This injury and delay is manifest in the present case. In the consolidated proceeding involving Northeastern's first application and Algonquin's application, hearings were

held almost continuously from March 7, 1950 to August 5, 1950, and the record comprised approximately 9,975 pages and more than 400 exhibits. There were more than one hundred intervenors in the case. The consolidated hearing on both applications was concluded on August 5, 1950, except that it was necessary for Algonquin to prove its gas supply by incorporating this evidence from the record in Texas Eastern's case in Docket No. G-1012. Two decisions (Opinions Nos. 201 and 202) were rendered by the Commission with respect to this matter prior to the filing of Northeastern's second application. In Opinion No. 201, which was rendered by the Commission on October 4, 1950, the Commission found that the record conclusively demonstrated the need for natural gas in New England (R., Vol. I, p. 84), and both Northeastern and Algonquin urged that this need was immediate and necessary in the interest of national defense (R., Vol. III, p. 680a). Thereafter, on November 8, 1950, the Commission issued its Opinion No. 202, in which it undertook to decide this controversy between the two rival applicants for service of natural gas in the New England area (R., Vol. I, p. 94). Then, on December 21, 1950, at a time when only one day remained for the conclusion of the hearing on the Algonquin and Texas Eastern applications, Northeastern filed its second application requesting authority to serve communities in New England which the Commission had denied to it in Opinion No. 202 and had determined and announced should be served by Algonquin (R., Vol. III, p. 673a). Northeastern moved that this second application be consolidated for hearing with the application of Algonquin (R., Vol. III, p. 727a). These facts alone are substantial evidence to support the finding of fact of the Commission that this second application of Northeastern was untimely filed. Despite this finding, the Court of Appeals held that

under Sec. 7(c) of the Natural Gas Act, as amended, Northeastern was entitled to a hearing on this application and that, under the principle announced by the Supreme Court in the *Ashbacker* case, a certificate could not be granted to Algonquin until this second application was heard by the Commission.

The Commission also found that Northeastern had been given a full opportunity to be heard on its first application and in opposition to the application of Algonquin, and concluded that "it cannot now thwart the expeditious disposition of its competitor's application by filing a second exclusive application" (R., Vol. I, p. 203).

The Court of Appeals committed error in disregarding the findings of fact by the Commission that Northeastern had previously been given a full opportunity to be heard on the issues involved in the second application (R., Vol. I, pp. 207-208). The statement by the Court of Appeals (R., Vol. VII, p. 1583) that it was imperative for the Commission to hear that part of Northeastern's plan in its second application relating to asserted savings in construction costs, service charges and scarce materials completely ignored the fact that such issues had already been presented by Northeastern in connection with its first application (R., Vol. III, pp. 628a-629a). Consequently, the filing of Northeastern's second application was in effect an attempt to rehear issues previously determined by the Commission in Opinion No. 202 which was permitted to become final.

The Commission dismissed the second application in so far as Northeastern sought to serve the twenty-six distributing companies which the Commission had determined in Opinion No. 202 should be served by Algonquin upon establishing its gas supply (R., Vol. I, p. 61). Seventeen of these twenty-six distributing companies were specifically covered by Northeastern's first application and it was denied the

right to serve them by Opinion No. 202. Northeastern did not seek to have this opinion reviewed pursuant to Section 19(b) of the Natural Gas Act, but it accepted in writing the certificate issued to it under the opinion. The other nine distributing companies, which were dismissed from Northeastern's second application, serve areas which are located in the vicinity of the main or lateral lines of Northeastern's proposed pipe line system as set forth in its first application. In its first application Northeastern sought to serve not only certain specific distributing companies, but "also such communities as logically should be served by the pipe line system, and which are thus part of the potential market for that system" (R., Vol. II, p. 443a). In the hearing on its first application Northeastern offered the testimony of its President to establish how it would serve all of these nine companies as well as all other gas distributing companies proposed to be served by Algonquin and to prove the cost of additional facilities which would be necessary to furnish such service (R., Vol. V, pp. 1265a-1266a). Northeastern's proposed tariff, which was offered in evidence in the hearing on its first application, establishes that it was holding itself out to serve any distribution system connecting with its pipe line system in the six New England states (Ex. 189, R., Vol. IV, p. 1036a). Further, Northeastern was an intervenor in the proceeding on Algonquin's application and participated fully in such case, both before and after Algonquin's application was consolidated for hearing with that of Northeastern.

It is recognized that Section 7(c) of the Natural Gas Act, as amended, provides that the matter shall be set for hearing and that the Supreme Court held in the *Ashbacker* case that where there are two *bona fide* mutually exclusive applications, one cannot be granted without hearing the other.

However, the Congress and the Supreme Court certainly did not intend to take from the Commission the discretion to determine whether there is a timely filing of competitive applications. Congress has vested in the Commission the right to exercise discretion in maintaining orderly proceedings by providing in the Natural Gas Act that the Commission shall perform all acts necessary or appropriate to carry out the provisions of the Act and that all hearings and proceedings shall be governed by procedure adopted by the Commission (Natural Gas Act, Secs. 15(b) and 16). Where the Commission has found, as in the present case, that an application was not timely filed and should be dismissed for this reason and that it was not in the public interest to consolidate it with the competitive application which was ripe for decision (R., Vol. I, p. 208), the courts may not set aside the action of the Commission where its findings of fact are supported by substantial evidence (Natural Gas Act, Sec. 19(b)).

All that the *Ashbacker* case decided was that "... where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."

We find no difficulty with the rule thus stated, but it must of necessity be subject to some practical limitations and there is nothing in the case to indicate that the Supreme Court did not so intend. Various administrative agencies have concerned themselves with attempted unwarranted extensions of the rule which would have the effect of completely inhibiting Commission action. Thus, the Federal Communications Commission adopted its Rule 1.387(b) under which it will name as a party to a hearing any person who has filed a mutually exclusive application *only* if the application in question is filed at least twenty days before the date on which the hearing on the prior

application is scheduled. See also In re *Big Sioux Broadcasting Co.*, 12 F. C. C. 146 (1947). The Civil Aeronautics Board in the *West Coast Case*, 8 C. A. B. 636 (1947), refused to extend the rule of the *Ashbacker* case in such a manner that it would be compelled to hold up decision on one application until the possible effect of the granting of that application on the success of a competing proposal could be determined, and pointed out that such a procedure would render it practically impossible for the Board to dispose of applications submitted to it. See also *Southwest-West Coast Merger Application*, 3A Pike & Fischer Ad. Law 48g. 14-1 (CAB 1950) and *Southwest Renewal-United Suspension Case*, 2 Pike & Fischer Ad. Law (2d) 98 (CAB 1952). The Securities and Exchange Commission refused to consolidate applications for approval of alternative plans under the Public Utility Holding Company Act of 1935 where the motions to consolidate were made after the hearings on the first plan had been in progress for more than a year and the record was approaching completion. This action of the Securities and Exchange Commission was reviewed by the Supreme Court after its decision in the *Ashbacker* case, and the Supreme Court found no error in the procedure followed. *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90 (1946). See also *Kentucky Broadcasting Corp.* v. *Federal Communications Commission*, 174 F. 2d 38 (D. C. Cir. 1949).

The attempted extension of the doctrine of the *Ashbacker* case in the instant case is more extreme than any of those referred to above, for in the instant case not only was the subsequent application untimely filed but the applicant had already been given a full hearing; the sole complaint is that a new hearing was not given on a second application the entire substance of which had just been the subject of an exhaustive hearing.

The Supreme Court should determine whether, under the circumstances recited herein, the Commission has the right to dismiss an application, the subject matter of which was accorded a full hearing in a prior proceeding and which application is filed near the conclusion of the hearing on the prior competitive applications, or whether it is required, as held by the Court of Appeals in this case, to set the second matter for hearing under Section 7(c) of the Natural Gas Act and hold up the decision of the prior competitive application until the new hearing has been held.

II.

It is of importance for the future guidance of Federal administrative agencies and those whose rights are affected by the actions of such agencies for the Supreme Court to determine whether the Court of Appeals in the present case properly held that the decision of the Supreme Court in *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572 (1950), is inapplicable to a case, such as the present one, in which the applicants seek authority to serve specific distributors in the same general area and such other communities as constitute a potential market for their pipe line systems.

In the *State Airlines* case the Supreme Court held that the Civil Aeronautics Board did not depart from the Congressional policy in awarding routes to airlines which differed markedly from those specifically detailed in the applications, and that in so doing the Board did not deny a full and fair hearing to the parties. The Court pointed out that such routes were all in the general area covered by the consolidated hearings. The Civil Aeronautics Act provides that the Board can issue a certificate authorizing the

whole or any part of the transportation covered by an application. The Natural Gas Act contains a similar provision and the Commission relied upon this provision in Opinion No. 202 when it held, "the Natural Gas Act provides that we may issue a certificate 'authorizing the whole or any part of the operation, sale, service, construction, extension or acquisition covered by the application' " (R., Vol. I, p. 109).

The extension of the rule of the *Ashbacker* case by the court below to the facts of the instant case was completely inconsistent with the decision of the Supreme Court as expressed in the *State Airlines* case. There, as here, the several applicants for certificates of convenience and necessity had requested authority to serve certain designated points. There, as here, the administrative agency consolidated the proceedings. There, as here, the administrative agency found it impossible to grant the certificates as applied for but, as here, it did allot the various points which were the subject of the consolidated hearing to the various applicants, in accordance with the agency's determination of what would best serve the public interest. The applicable portions of the statutes involved in that case and in this are practically identical. There, as here, it was plain from the record that the applicants recognized each other as potential competitive applicants in the consolidated proceedings. Under the rule of the *State Airlines* decision, therefore, it is clear that the attempt to extend the *Ashbacker* ruling to this case was wholly unwarranted, since Northeastern had had a full and fair hearing in the consolidated proceedings on all matters of substance contained in its new application with respect to which a new hearing was refused by the Commission.

However, the Court of Appeals in the instant case rejected the authority of the *State Airlines* case in the following language (R., Vol. VII, p. 1581):

> "The Commission strenuously endeavors to justify its action in allocating those ten distributors in No. 202 'even if it be concluded that the markets assigned to each of the applicants, Northeastern and Algonquin, were not within the purview of the authority sought in the applications' by citing as authority for such practice, Civil Aeronautics Board *v.* State Airlines, 338 U. S. 572. That case is of no help for it is an area decision with the awards 'all in the general area covered by the consolidated hearings.' The vital difference from that case in the matter before us is that the hearing which was held in the present issue concerned the assignment of specific distributors in the New England territory."

It is true that in the instant case the applicants sought assignment of specific distributors in the New England area but all of such distributors were in the same general area. In fact, there was considerable overlapping of the pipe line systems proposed by Algonquin and by Northeastern in its first application as shown by the map attached hereto (Exhibit 1). The term "area proceeding" as used in the *State Airlines* case is merely descriptive of a consolidated proceeding involving a number of applicants for a number of routes in the same general area and arises by virtue of the nature of the applications which create an area problem. Neither the Civil Aeronautics Act nor the rules of the Civil Aeronautics Board contain any special provisions for an "area proceeding" as such and as differentiated from an ordinary proceeding under the Act. Consequently, it is submitted that the consolidated hearing on the applications of Northeastern and Algonquin to serve the New England area can

and should be designated an "area proceeding" in the same sense as that term is used in the *State Airlines* case; and that therefore the Court of Appeals erred in holding the *State Airlines* case inapplicable because it involved an "area proceeding."

Further, Northeastern sought in its first application not only authority to serve specific distributors but also those communities which could logically be served by its pipe line system and which constituted a potential market for that system (R., Vol. II, p. 443a). It should be noted that Northeastern did not seek specific authority to serve Worcester Gas Light Company, a contract customer of Algonquin and presently Northeastern's largest customer. However, having been assigned this customer by the Commission in Opinion No. 202 pursuant to the authority of the *State Airlines* case, Northeastern elected to accept it.

From the foregoing it will be seen that the construction placed by the Court of Appeals upon the decision of the Supreme Court in the *State Airlines* case, is not justified by the facts of that case.

The construction by the Court of Appeals of the *State Airlines* case also runs counter to the general principles adopted by the Supreme Court with respect to regulation by administrative agencies of companies engaged in rendering service to the public. In *United Fuel Gas Co.* v. *Railroad Commission of Kentucky,* 278 U. S. 300, 309 (1929), the Supreme Court said:

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. An important purpose

> of state supervision is to prevent such discriminations, * * *"

In *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 322 U. S. 1, 3-4 (1943), the Supreme Court said:

> "The question of law in the case is whether the Commission on its finding need for such service had power to authorize service of intermediate points not asked for by the applicant . . . It is clear that the Commission on the facts found had power to include in the authorization provision for service greater than the carrier had asked."

See also *People* Ex Rel. *New York & Queens Gas Co.* v. *McCall,* 245 U. S. 345, 351 (1917).

Since the Court of Appeals erred in not holding that the action of the Commission in dividing the markets between Northeastern and Algonquin in Opinion No. 202 was justified under the *State Airlines* case, it follows that such opinion and accompanying order constituted a final determination between these rival applicants with respect to the markets to be served by each of them in the New England area. Accordingly, the Commission was justified in dismissing on January 10, 1951, Northeastern's second application and also the petitions of intervention of Northeastern and Tennessee in the proceeding involving Algonquin's application since the issue of competition for the New England markets had been decided by the Commission in Opinion No. 202. There was no reason to permit Northeastern and Tennessee to continue in Algonquin's case and allow them to delay a determination of Algonquin's application since the competitive issue had been decided between these two rival applicants.

Northeastern and Tennessee were not injured as a result of the dismissal of their petitions of interven-

tion at a time when only one day of hearing remained in the Algonquin case for the sole purpose of permitting it to incorporate its evidence of gas supply from the record made by its supplier, Texas Eastern, in Docket No. G-1012. They continued as participants in Texas Eastern's case and had full opportunity to offer evidence and argument on this issue of gas supply, and Northeastern recognized the adequacy of such supply by requesting a supply of gas from Texas Eastern (R., Vol. III, pp. 689a-690a).

The fact that the Commission made a determination in Opinion No. 202 as to the markets to be served in New England by the two applicants before Algonquin had completed evidence of its gas supply does not affect the conclusiveness of this determination as between such parties.

In the *New England Divisions Case,* 261 U. S. 184, 201 (1923), the Supreme Court said:

> "A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. * * *"

In *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 583-584 (1942), the Supreme Court upheld a final order of the Commission, which was issued at an interim stage of the proceedings, requiring the Company to file new tariffs which would reduce its net income by a certain amount. The Company contended that the Commission was without power to issue a final order at this stage of the proceeding. The Court said:

> "The first prerequisite to an order by the Commission is that it shall be preceded by a hearing and findings. In this case, while the proceedings were

> not ended by the interim order, the companies had full opportunity to offer all their evidence both direct and in rebuttal, and full opportunity to cross-examine every witness offered by both the Federal Power Commission and the Illinois Commerce Commission. All the evidence tendered was received and considered by the Commission, and before the interim order was entered counsel for the companies stated to the Commission that they had concluded the direct testimony in support of their case."

See also *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U. S. 265 (1949); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 525 (1946); *Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839, 842 (D. C. Cir. 1950); *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. 2d 586, 591 (2d Cir. 1941).

It is important for the Supreme Court to determine for the guidance of administrative agencies and parties affected by actions of such agencies whether the Court of Appeals has properly construed the *State Airlines* case. If the Court of Appeals was correct in its holding that the *State Airlines* case was inapplicable here, the applicability of that case is so limited that it is useless as a guide to administrative procedure. If the Court of Appeals was in error in holding that such case was inapplicable, it follows that in Opinion No. 202 the Commission properly decided the competitive issue between Northeastern and Algonquin by assigning various gas distributing companies to each of them and thereafter preventing Northeastern and Tennessee from taking any action which would thwart the expeditious disposition of Algonquin's application.

Conclusion.

It is submitted that these are important questions of Federal law which will cause confusion in the administration of the Natural Gas Act and other Acts with resulting injury to the general public unless the same are settled by the Supreme Court. For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix.

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended by 56 Stat. 83 (1942), 15 U. S. C. 717 *et seq.* are as follows:

SEC. 7(c). No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to

serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. • • •

SEC. 7(e). Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. • • •

SEC. 15(b). All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter. • • •

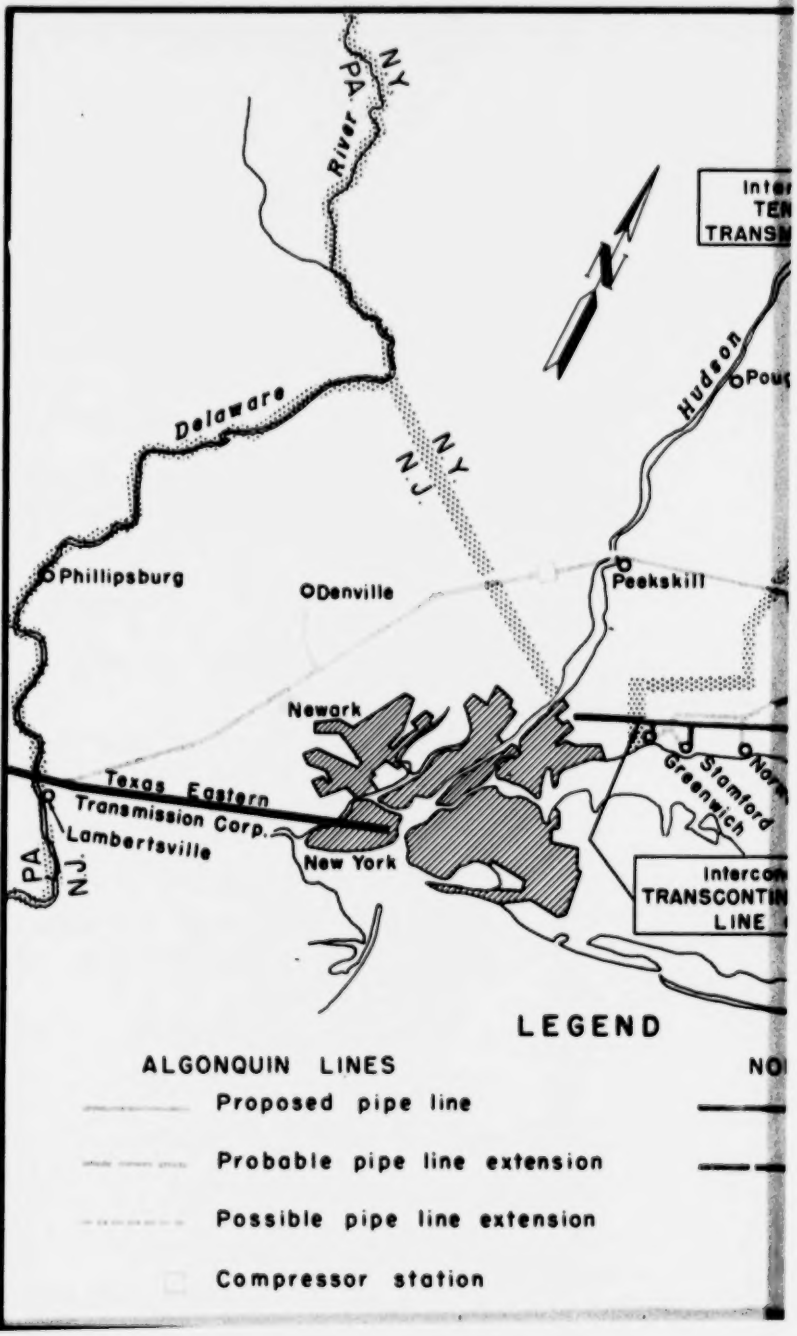
SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in

this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. * * *

SEC. 19(b). Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported

by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28. • • •

SEC. 19(c). The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. • • •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ALGONQUIN LINES
Proposed pipe line
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Possible pipe line extension
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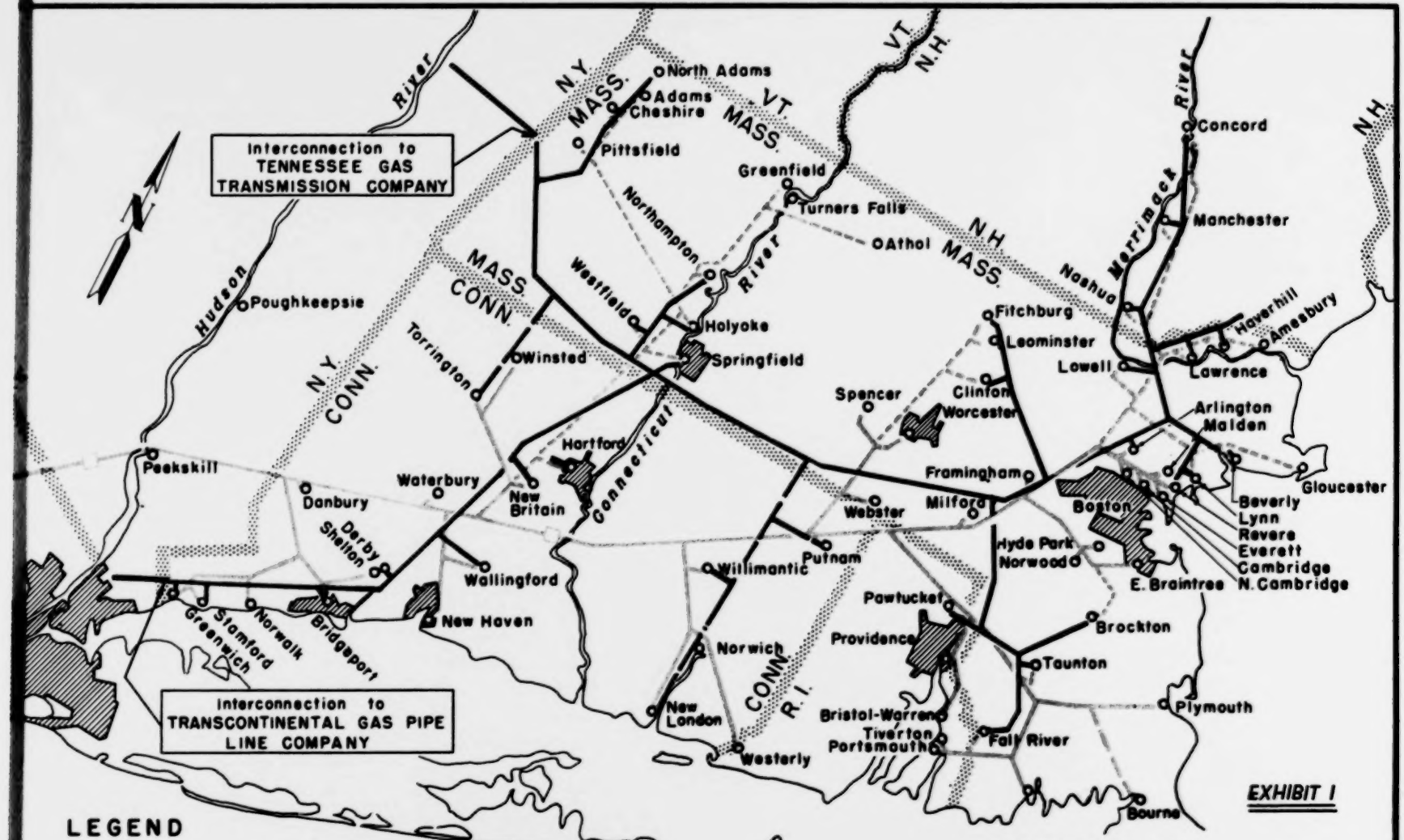


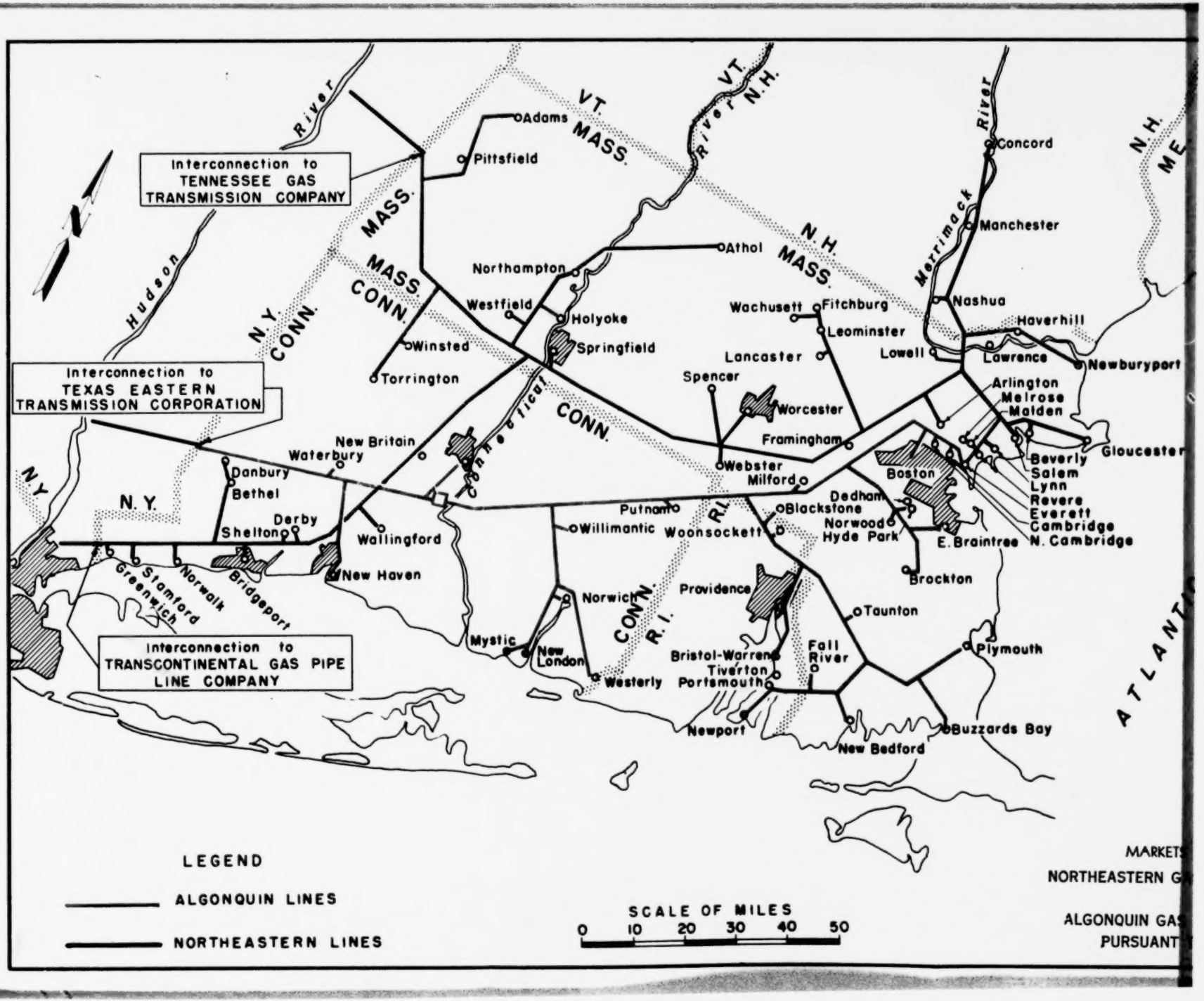
EXHIBIT I

COMPOSITE MAP

SHOWING PROPOSED SYSTEMS OF NORTHEASTERN GAS TRANSMISSION COMPANY AS SHOWN BY MAP ATTACHED TO ITS FIRST AMENDED APPLICATION FILED IN DOCKET NO. G-1267 ON MARCH 2, 1950

AND

ALGONQUIN GAS TRANSMISSION COMPANY AS SHOWN BY MAP ATTACHED TO ITS FIRST AMENDED APPLICATION FILED IN DOCKET NO. G-1319 ON MAY 1, 1950.



MARKETS
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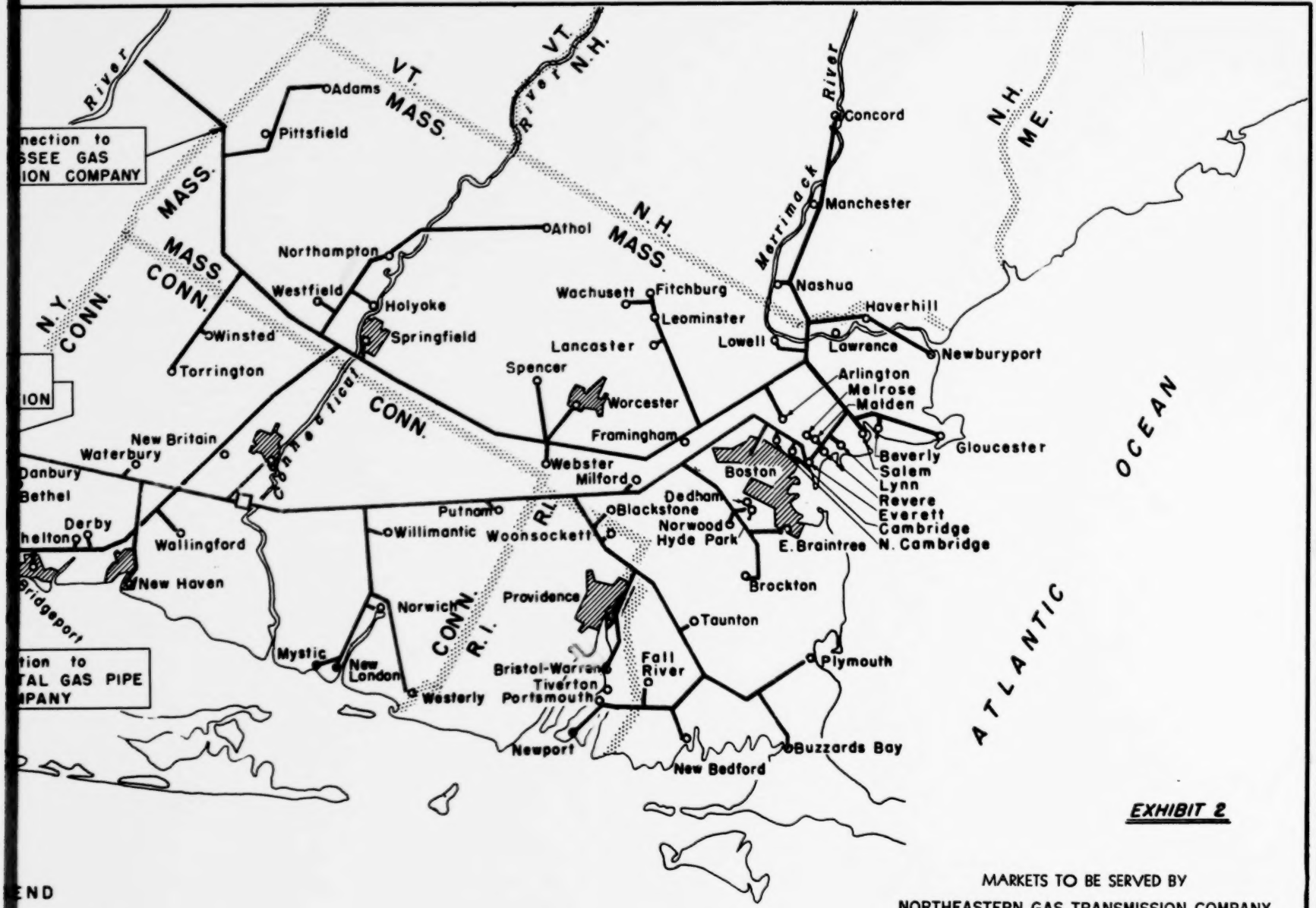

EXHIBIT 2

MARKETS TO BE SERVED BY
NORTHEASTERN GAS TRANSMISSION COMPANY
AND
ALGONQUIN GAS TRANSMISSION COMPANY
PURSUANT TO OPINION NO 202